(2)

Filed

No. 03-1442

IN THE

Supreme Court of the United States

EAGLE INSURANCE COMPANY and
NEWARK INSURANCE COMPANY,

Petitioners,

v.

BANKVEST CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether 11 U.S.C. § 365(b)(2)(D) requires Bankvest Capital Corporation ("Bankvest" or "Respondent" or "Debtor") to cure nonmonetary defaults as a condition to assuming lease contracts executed by Eagle Insurance Company and Newark Insurance Company ("Petitioners"), where the alleged defaults are based on the delivery of non-conforming equipment, the Debtor has no obligations to make payments under the leases, and the only payment obligations are those of Petitioners?

2. Whether any claims or defenses available to Petitioners based on the Debtor's alleged default by delivery of nonconforming equipment should be addressed in an evidentiary hearing in a court of competent jurisdiction?

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1. While the Debtor believes that certiorari is not merited in this case, pursuant to Supreme Court Rule 15, because the Debtor believes that the Petition mischaracterizes the questions presented, the Debtor submits a formulation of the first issue that more accurately describes the issues raised in this Court, and includes an alternative holding of the courts below as the second issue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, by and through its undersigned attorneys, hereby discloses that:

Respondent Bankvest Capital Corporation is a nongovernmental corporate party, has no parent corporation and no publicly held company owns 10% or more of its stock.

Bankvest's representative U.S. Bank Portfolio Services is a division of Lyon Financial Services, Inc., which is entirely owned by U.S. Bancorp Equipment Finance, Inc. U.S. Bank Portfolio Services is the successor to Finova Loan Administration, Inc.

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INTRODUCTION

The essence of these proceedings is Petitioners' continued efforts to delay two collection actions commenced by a lessor, which happens to be a chapter 11 debtor, against two lessees of computer equipment which owe the Debtor in excess of $1,000,000. Petitioners seek to use Bankruptcy Code § 365(b)(2)(D) as a sword, against the Debtor, to defeat the Debtor's state law right to bring these actions. Moreover, Petitioners seek to have this Court facilitate their evasion of contractual obligations by taking up a correctly decided case and determining an issue that is not necessary to the resolution of the parties' ultimate disputes. Petitioners' generalizations and exaggerated statements about the purported impact of this case, and putative expressions of concern for the consistency of law are completely detached from any explanation of how *in this case* Petitioners are being harmed.

In fact, in the present case, *it is Petitioners that owe funds to the Debtor*. At most, Petitioners have alleged defenses to payment. Petitioners have, for years, avoided making payments for their use of the equipment leased to them by the Debtor. As opposed to every other case discussing § 365(b)(2)(D), in the present case there is an actual dispute as to whether a default even occurred. For all intents and purposes, the issues raised by Petitioners regarding nonmonetary defaults are academic or moot: Petitioners are now litigating the merits of their respective claims and defenses on the contracts at issue in the state court litigation instituted by the Debtor in October 2003 to collect unpaid lease charges from Petitioners.

While Petitioners suggest throughout their Petition that the decision of the First Circuit below has adversely affected the balancing between debtor and creditor interests in bankruptcy, all Petitioners really seek is to be absolved of any of their responsibility under the leases with the Debtor. It would be a strange 'balancing' indeed if Petitioners were able to escape their obligations to compensate the Debtor solely based upon the Debtor's bankruptcy filing. If anything, entities in bankruptcy are to be afforded the benefit of at least equal protections in bankruptcy as they would have outside – not to be placed in a worse position *vis-à-vis* third parties.

As set forth below, in view of the absence of any true conflict among the Courts of Appeals, and in view of the judicial restraint principles implicated by the Petition and the equities of the case, certiorari is neither warranted nor appropriate.

STATEMENT OF THE CASE

I. Statement Of Facts

On or about May 27, 1999, Petitioners each signed separate Master Lease Agreements (collectively, the "Leases") and other related contracts with the Debtor. App. 115-31; 137-51.[2] Under the Leases, Petitioners respectively leased approximately 190 pieces of computer equipment (the "Equipment") for a forty-eight month term. App. 115-22; 137-46. Petitioners agreed to pay monthly rent in the amounts of $11,940.61 (for Eagle Insurance Company) and $10,111.82 (for Newark Insurance Company). App. 121; 143.

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2. References designated herein as "App." are to the record which was before the First Circuit Court of Appeals. As was noted in the proceedings below, App. 178 n.2, certain of the contract documents supplied by Petitioners bear handwritten notations which were manifestly added long after the document was signed.

Two years later, and well into the Debtor's bankruptcy proceedings, Petitioners claimed for the first time that they were excused from payment because, although they received the Equipment in July and August 1999, twenty items per lease were substitute equipment provided for use pending production of other items. App. 112; 134. Petitioners assert that "an arrangement was made with [vendor] Nortel for the delivery of 20 items of loaner equipment, which Nortel delivered in August." Petitioners' Moving Brief to the First Circuit Court of Appeals, dated August 25, 2003 ("Pet'r First Cir. Br.") at 4; App. 184. Petitioners allege that the Debtor knew of this outside arrangement but do not allege that the Debtor was a party to it.[3] The substitute items are alleged to represent much of the value of the Equipment. No allegation has been made that the Equipment, including all of the allegedly substituted items, did not operate in accordance with Petitioners' business requirements.

After receiving the Equipment, Petitioners signed Acceptance Certificates dated August 25, 1999, which indicate a Lease Term Commencement Date of August 17, 1999 (collectively, the "Certificates"). App. 128; 147.[4]

3. Petitioners have asserted, without specifying a date, that "[t]he Debtor was made aware that [Petitioners] did not receive all of the equipment." App. 112; 134. *See also* App. 184.

4. Acceptance was an important event, triggering payment to the vendor by the Debtor, and Petitioners' obligations to the Debtor under the Leases. It is the Debtor's position that upon acceptance, Petitioners' commitments under the Leases became irrevocable and independent. *See* MASS. GEN. LAWS ANN. ch. 106, § 2A-407; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 10 (4th ed. 1995) ("The lessee under the statute must pay the finance lessor – come hell or high water."). *See also Nat'l Westminster Bancorp v. ICS Cybernetics, Inc.* (*In re ICS Cybernetics, Inc.*), 123 B.R. 467, 477 (Bankr. N.D.N.Y. 1989), *aff'd*, 123 B.R. 480 (N.D.N.Y. 1990) ("So-called 'hell or high water' clauses have been routinely accorded full force and effect by courts even in the face of defaults by the party seeking to enforce them.").

The language of the Certificates confirms that the Equipment operated as required. In paragraph 1, Petitioners acknowledged that "the Equipment set forth on Schedule A hereto (the "Equipment") is hereby unconditionally accepted by the Lessee for all purposes under the Lease and hereby agree[d] to faithfully perform all of it's [sic] obligations under the Lease with respect to the Equipment as of the date hereof." App. 128; 147. In paragraph 2, Petitioners represented and warranted that "the Equipment has been delivered and is in an operating condition and performing the operation for which it is intended to the satisfaction of the Lessee." App. 128; 147. Each of the Leases states:

> If the Equipment is not delivered, is not properly installed, does not operate as warranted, becomes obsolete, or is unsatisfactory for any reason whatsoever, Lessee shall make all claims on account thereof solely against the manufacturer or supplier and not against Lessor, and Lessee shall nevertheless pay all rentals and other sums payable hereunder.

App. 115; 137.

Petitioners used all Equipment received before the Lease Term Commencement Date, including the allegedly non-conforming substitute equipment, without complaint and without payment for more than two years. As the Bankruptcy Court brought out at the Hearing:

> **THE COURT:** Let me ask you: One of the troubling things in this whole situation is, where has your client been through this whole situation? This lease was entered into when? In 19 – May of '99. And you were supposed to get the goods in, was it the late summer or early fall of '99?

PETITIONERS' COUNSEL: No, no. The – there were – in August of 1999 I believe –

THE COURT: The commencement date was August 20th, '99.

PETITIONERS' COUNSEL: Yeah, and I think it was December or January – December '99 or January 2000 is when the other items were supposed to be delivered. In the meantime the manufacturer delivered to us certain loaner equipment. I don't know that it's terribly relevant here, but the goods weren't even being bought, in any case, from the manufacturer. They were being bought from a dealer who bought from the manufacturer.

THE COURT: But that – let's not obfuscate the question.

PETITIONERS' COUNSEL: I –

THE COURT: I asked you where was your client during this whole proceeding? I mean, we didn't hear from you – you weren't making payments. You didn't do anything until confirmation time; actually after confirmation.

PETITIONERS' COUNSEL: Oh, well –

THE COURT: What was your client doing during this period of time?

PETITIONERS' COUNSEL: We didn't do anything in –

THE COURT: Other than using the equipment?

App. 216-18.

II. Proceedings Below

The proceedings in this matter originated with the requests (the "Requests") of Petitioners for payment of cure costs pursuant to 11 U.S.C. § 365, filed with the Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") on June 15, 2001. App. 111-32; 133-52. The Fifth Amended Joint Liquidating Plan of Reorganization, as Modified (the "Plan"), required all parties to executory contracts and unexpired leases with the Debtor to file requests for payment of cure costs on or before the Plan's effective date. App. 55.[5]

On August 15, 2001, Finova Loan Administration, Inc. ("Finova"), on behalf of the Debtor,[6] objected to the Requests.

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5. The Leases would have been assumed on June 11, 2001 – the effective date of the Plan – absent the filing of the Requests. App. 11-12; 245. The confirmation order in the Debtor's case, issued on May 31, 2001, provides that

> [i]n the event a claim for the Cure Costs is made, the time for the Debtor to assume or reject any such contract or lease shall be extended until such time as the Bankruptcy Court enters a Final Order determining the Claimant's entitlement to Cure Costs and the amount of such Cure Costs.

App. 12. The Plan defines Final Order as an "order of the Bankruptcy Court or other court having jurisdiction over any matter, from which no appeal can be taken or with respect to which the time period for taking an appeal has lapsed or terminated, or as to which all appeals have been withdrawn or dismissed with prejudice." App. 23. The Plan defines Cure Costs as "[t]hose payments and assurances required upon assumption of an executory contract or unexpired lease pursuant to 11 U.S.C. § 365(b)(1)." App. 22.

6. The Debtor and Finova entered into a stipulation, filed with the Bankruptcy Court on August 6, 2001, in which Finova agreed to defend the cure claims asserted by Petitioners. App. 107-09.

App. 153-72. The Bankruptcy Court then issued an order requiring Petitioners and the Debtor to submit memoranda of law on the issue of whether Petitioners' claims were "cure claim[s] or something else." App. 248-49. After receiving memoranda of law, the Bankruptcy Court held a non-evidentiary hearing on November 7, 2001 (the "Hearing"). App. 197-231. Throughout the briefing and decisions of the lower courts, the case has been treated akin to a motion to dismiss, whereby Petitioners' allegations were taken as true for purposes of the decision on the assumption only;[7] however, as discussed below, there are many factual issues in the case, including, significantly, whether there was even a default by the Debtor at all on the Leases with Petitioners.

On December 12, 2001, the Bankruptcy Court entered a decision and order (the "Bankruptcy Court Order") which concluded that Petitioners had no cure claims that needed to be satisfied prior to the Debtor's assumption of the Leases, but provided that any defenses or counterclaims raised by Petitioners could be pursued in a non-bankruptcy court of competent jurisdiction. *In re Bankvest Capital Corp.*, 270 B.R. 541, 544 (Bankr. D. Mass. 2001) (*Bankvest I*); App. 236-37. On December 21, 2001, Petitioners filed notices of appeal of the Bankruptcy Court Order to the Bankruptcy Appellate Panel for the First Circuit (the "Appellate Panel"). App. 238-41.

On March 28, 2003, the Appellate Panel affirmed the Bankruptcy Court Order, finding no error in

> (1) interpreting § 365(b)(2)(D) as not requiring the Debtor to cure any non-monetary defaults as

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7. *In re Bankvest Capital Corp.*, 360 F.3d 291, 293 & n.1 (1st Cir. 2004) (*Bankvest III*); App. 236-37; *In re Bankvest Capital Corp.*, 290 B.R. 443, 445 n.5 (B.A.P. 1st Cir. 2003) (*Bankvest II*); App. 258, 263; *In re Bankvest Capital Corp.*, 270 B.R. 541, 543-44 (Bankr. D. Mass. 2001) (*Bankvest I*).

> a condition to assuming the [Leases], and (2) finding that any claims or defenses available to [Petitioners] based on the Debtor's alleged non-monetary default should be addressed in the context of an evidentiary hearing in a court of competent jurisdiction.

In re Bankvest Capital Corp., 290 B.R. 443, 445 (B.A.P. 1st Cir. 2003) (*Bankvest II*); App. 260.

Before proceeding to its analysis, the Appellate Panel quoted from the Bankruptcy Court's decision:

> Common sense dictates that the failure to deliver certain items is a quintessential example of a nonmonetary default. ***The Debtor was not required to make any payments. Indeed the money was to flow from Eagle and Newark to the Debtor.*** Therefore there are no cure claims to be satisfied before assumption and assignment of the leases. ***At best there are only claims for whatever damages Eagle and Newark can demonstrate flowed from the delivery of loaner items in place of the scheduled items. These claims need to be addressed in the context of an evidentiary hearing at which the parties will have to introduce evidence as to the claims and defenses thereto***[.]

Bankvest II, 290 B.R. at 445 (quoting *Bankvest I*, 270 B.R. at 544); App. 259-60 (emphasis supplied).

On the issue of whether § 365(b)(2)(D) required cure of nonmonetary defaults as a condition to the Debtor's assumption of the Leases, the Appellate Panel affirmed the Bankruptcy Court's "plain language" reading of the provision that "'penalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required

to cure prior to assumption.'" *Bankvest II*, 290 B.R. at 446 (quoting *Bankvest I*, 270 B.R. at 543); App. 261.[8] The Appellate Panel found the Bankruptcy Court's determination that the "'parties are free to pursue whatever claims, counterclaims, and defenses they have in a non-bankruptcy court of competent jurisdiction'" consistent with case law holding that assumption is a summary proceeding. *Bankvest II*, 290 B.R. at 448 (quoting *Bankvest I*, 270 B.R. at 544); App. 264. "[T]he only issue properly before a court [on lease assumption] is whether the assumption or rejection of the subject contract is based upon a debtor's business judgment . . . In the instant appeal, there was no issue relative to the Debtor's business judgment regarding the assumption of the Lease Agreements." *Bankvest II*, 290 B.R. at 448; App. 263-64. Noting that it was undisputed that no payments were due to Petitioners under the Leases, the Appellate Panel stated, "[i]f a debtor wants to assume in its business judgment, knowing that issues other than payment due may be litigated after assumption, the debtor should be allowed to do so." *Bankvest II*, 290 B.R. at 448; App. 264.

Petitioners then appealed to the First Circuit Court of Appeals on April 16, 2003. App. 266-67. The First Circuit affirmed the ruling of the Appellate Panel on March 15, 2004,

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8. The Debtor had not raised § 365(b)(2)(D) as a basis for denying Petitioners' Requests. This was because it was, and is, the Debtor that was asserting substantial claims against the Petitioners, and the Debtor never sought to bar Petitioners' assertion of defenses but rather agreed to have the alleged defenses to payment resolved through full litigation on the merits. It is for this reason that the Debtor relied on *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993) (holding that motions to assume are summary proceedings and not the proper setting for resolving the merits of the parties' claims), and similar authority.

holding that under § 365(b)(2)(D), the Debtor was not required to cure nonmonetary defaults before assuming the Leases with Petitioners. *In re Bankvest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004) (*Bankvest III*). Finding the text of § 365(b)(2)(D) ambiguous, and the legislative history unhelpful, the First Circuit focused on the "practical considerations of bankruptcy policy and Congress's overarching purposes in the Bankruptcy Code" and concluded that the statute excused debtors from curing penalty rates as well as nonmonetary defaults prior to assumption. *Bankvest III*, 360 F.3d at 297-300. In so doing, the First Circuit noted that many nonmonetary defaults are "historical facts" that are incapable of being cured, and thus, requiring a debtor to cure such defaults would prevent the debtor from assuming any contract in which such a default had occurred. *Bankvest III*, 360 F.3d at 299-300. This, the Court explained, would "undermine[] Congress's basic purpose in § 365: to promote 'the successful rehabilitation of the business for the benefit of both the debtor and all its creditors.'" *Bankvest III*, 360 F.3d at 300 (quoting *Mason v. Official Comm. of Unsecured Creditors* (*In re FBI Distrib. Corp.)*, 330 F.3d 36, 45 (1st Cir. 2003)). The First Circuit added that this interpretation of § 365(b)(2)(D) was consistent with the remaining subparagraphs in § 365(b)(2) and was not inconsistent with any legislative history. *Bankvest III*, 360 F.3d at 300-01. Finally, the Court emphasized that although the Debtor was now free to assume the Leases and file an action for outstanding payments, the assumption proceeding was not the place to resolve issues related to Petitioners' defenses and counterclaims for damages. *Bankvest III*, 360 F.3d at 301-02.

III. Concurrent Proceedings On The Merits

On or about October 17, 2003, the Debtor commenced actions against Petitioners, by two separate complaints (the "Complaints"), in the Suffolk County Superior Court of the Commonwealth of Massachusetts.[9] *See* Appendices A and B hereto. By the Complaints, Bankvest seeks to collect monies due under the Leases from Petitioners, as lessees and guarantors, and to recover the Equipment which Petitioners have refused to return. The Complaints allege counts against Petitioners for breach of the Leases and breach of guaranties, and seek, among other things, $608,911.32 (47 past due payments of $12,955.56) from Eagle Insurance Company and $475,255.54 (47 past due payments of $10,111.82) from Newark Insurance Company.

On or about April 1, 2004, Petitioners filed answers and counterclaims to the Complaints.[10] *See* Appendices C and D

9. The Debtor's suit against Eagle Insurance Company is styled *Bankvest Capital Corp. v. Eagle Insurance Company, Newark Insurance Company and Material Damage Adjustment Corp.*, No. 03-4936 (Mass. filed Oct. 17, 2003) (Newark and Material Damage Adjustment Corp. are joined as guarantors). The Debtor's suit against Newark Insurance Company is styled *Bankvest Capital Corp. v. Newark Insurance Company, Eagle Insurance Company and Material Damage Adjustment Corp.*, No. 03-4937 (Mass. filed Oct. 17, 2003) (Eagle and Material Damage Adjustment Corp. are joined as guarantors).

10. The answers and counterclaims were not filed until approximately five months after the filing of the Complaints because of various positions taken by Petitioners. First, Petitioners filed motions to dismiss the Complaints based upon a lack of standing, alleging that, under the Plan, Bankvest lacked standing to sue in its own name. These motions were ultimately withdrawn by Petitioners on the hearing date. Petitioners then further delayed filing their (Cont'd)

hereto. Petitioners have asserted numerous defenses including (1) failure of consideration; (2) failure to deliver the equipment that was the subject of the lease; (3) promissory estoppel; (4) waiver; (5) fraudulent inducement to execute the Certificates; (6) that the Leases have not been assumed and the Debtor's claims will be barred if the Leases are rejected;[11] (7) that the Debtor breached the agreements before Petitioners; and (8) alteration of the terms of the Leases without the consent of the guarantors. Petitioners have also counterclaimed for (1) breach of the Leases for failure to deliver; (2) fraud in the inducing of the Petitioners' execution of the Certificates; (3) promissory estoppel with respect to the enforcement of the Certificates; (4) fraud based on the Debtor's alleged knowledge that it would not have the financial ability to perform under the Leases; and (5) rescission based on a failure of consideration.

(Cont'd)
response, based upon their assertion that they needed relief from the automatic stay to assert counterclaims. Bankvest consented to such relief from stay as soon as practicable after the issue was raised, and an agreed order providing for stay relief was approved by the Bankruptcy Court.

11. The Debtor has sought to assume the Leases during the pendency of the appeals, but Petitioners have opposed such relief, notwithstanding their failure to even seek a stay of the Bankruptcy Court Order. On January 22, 2004, over Petitioners' objection, the Bankruptcy Court approved the assumption of the Leases pursuant to a stipulation between Bankvest and its secured creditor Ark CLO 2000-1, Limited, which has a security interest in the Leases and their proceeds. Thereafter, Petitioners moved for rehearing. The Debtor attempted to address Petitioners' concerns in an amended stipulation – to which Petitioners continue to object. The matter is presently pending before the Bankruptcy Court.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Courts Of Appeals

As this Court has repeatedly stated, where the asserted basis for the Court's grant of a petition is a purported conflict, but an accurate analysis of the facts and circumstances of the cases shows that there really is none, the grant of certiorari is inappropriate. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 813 (1931); *Sanchez v. Borras*, 283 U.S. 798, 798-99 (1931); *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 392-93 (1923). With respect to the instant Petition, there is no conflict among the Courts of Appeals because no Court of Appeals other than the First Circuit in the case below has addressed the issue of the application of § 365(b)(2)(D) in the context of an alleged default which would nonetheless be litigated in another forum. *See* Honorable John M. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L. J. 108, 111-12 (1959) (decisions are not conflicting where differences between Circuit Court decisions "can fairly be accounted for on the basis of variations in the factual situations among the cases involved").

Petitioners assert that the First Circuit's decision below conflicts with the Ninth Circuit's decision in *Worthington v. General Motors Corp. (In re Claremont Acquisition Corp.)*, 113 F.3d 1029 (9th Cir. 1997). However, the decision below and the *Claremont* decision involved such substantially different facts that they cannot be said to be truly conflicting. The *Claremont* case involved the assumption and assignment by the debtor of an automobile franchise agreement. *Claremont*, 113 F.3d at 1030-31. Prior to filing for bankruptcy, the debtor-automobile franchisee had closed for a period of two weeks in violation of the terms of the franchise agreement. *Claremont*, 113 F.3d at 1032-33. It was

undisputed that the two-week closure had occurred and that such closure caused the debtor to be in default of the franchise agreement. *Claremont*, 113 F.3d at 1032-33 (9th Cir. 1997). The Ninth Circuit Court of Appeals found that the closure was a nonmonetary default which was incapable of being cured. *Claremont*, 113 F.3d at 1033. Holding contrary to both the *Claremont* bankruptcy court and district court, the Ninth Circuit found that assumption was thereby prohibited, and that § 365(b)(2)(D) did not excuse the debtor from curing a nonmonetary default (but rather addressed only penalty rates and penalty provisions). *Claremont*, 113 F.3d at 1033-35.

That there had been a default on the franchise agreements in *Claremont* was not disputed, nor were there any other proceedings between the parties with respect to the existence of the default. Indeed, in *Claremont*, if the Court had applied § 365(b)(2)(D) as requested by the debtor in that case, there would be no further litigation of the claims raised by the franchisor. Unlike *Claremont*, in the present case, there is a dispute as to whether a default even occurred. Moreover, from the inception of the dispute regarding assumption, Bankvest has stipulated on the record that Petitioners could assert their defenses to payment in the state court litigation, which Bankvest has instituted to collect payments due under the Leases, and in which Petitioners have set forth defenses and counterclaims in pleadings filed in those actions. *See supra* 11-12 and Appendices A-D hereto. Both the Bankruptcy Appellate Panel and the First Circuit recognized that there was nothing wrong with a debtor's assumption of a contract knowing there would be ensuing litigation on the contract. *Bankvest III*, 360 F.3d at 301-02; *Bankvest II*, 290 B.R. at 448; App. 264-65. In this regard, the lower courts focused on the summary nature of the assumption proceedings, as explained by *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993). *See infra* Part V.

Moreover, and unlike *Claremont*, the courts in the present case repeatedly emphasized that, because it was the *Debtor* who was to receive all payments under the Leases, it was in the best interests of the Debtor, the estate and creditors that the litigation on the merits of the parties' respective claims go forward to permit the Debtor to recover the substantial value of the Lease payments due for the estate, while at the same time providing a forum for Petitioners to litigate their defenses to payment. *Bankvest III*, 360 F.3d at 295, 301-02; *Bankvest II*, 290 B.R. at 447-48; *Bankvest I*, 270 B.R. at 544; App. 264-65; 236-37.

The existence of these distinguishing factors — the continuing ability to litigate disputed issues of whether a default has even occurred (which issues are currently being litigated on the merits) and that payment was due *to* the Debtor (not *from* the Debtor), serve to render the present case fully distinct from *Claremont*. Indeed, the fact that in the present case there is a dispute as to whether the Debtor was in default, which dispute is now being litigated on the merits in state court,[12] not only distinguishes the present case from *Claremont*, but also from all of the other cases which have even mentioned § 365(b)(2)(D) (whether directly or by implication).[13]

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12. Moreover, this litigation can proceed even in the absence of an assumption setting because Petitioners, as non-debtor parties, are obligated to perform their obligations under the Leases prior to rejection or assumption. *See, e.g., Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.* (*In re Pub. Serv. Co. of New Hampshire*), 884 F.2d 11, 14-15 (1st Cir. 1989) (prior to assumption or rejection, "the executory contract remains in effect and creditors are bound to honor it").

13. *See Three Sisters Partners, L.L.C. v. Harden* (*In re Shangra-La, Inc.*), 167 F.3d 843, 848 n.3 (4th Cir. 1999) (default not in issue; only discussed § 365(b)(2)(D) in a footnote to acknowledge that default rate interest is not available for nonmonetary defaults); (Cont'd)

For the foregoing reasons, the decisions of the First and Ninth Circuits are clearly distinguishable on their facts, thus negating the existence of any true conflict and rendering a grant of certiorari inappropriate.

(Cont'd)

In re Williams, 299 B.R. 684, 685 (Bankr. S.D. Ga. 2003) (court found debtor had defaulted by driving leased truck for another company); *In re Walden Ridge Dev., LLC*, 292 B.R. 58, 65-68 (Bankr. D.N.J. 2003) (court made findings of fact on motion to assume); *In re New Breed Realty Enters., Inc.*, 278 B.R. 314, 316-17 (Bankr. E.D.N.Y. 2002) (debtor's failure to purchase property was undisputed); *In re Phoenix Bus. Park Ltd. P'ship.*, 257 B.R. 517 (Bankr. D. Ariz. 2001) (did not involve nonmonetary default); *Yates Dev., Inc. v. Old Kings Interchange, Inc.* (*In re Yates Dev., Inc.*), 241 B.R. 247, 255 (Bankr. M.D. Fla. 1999), *aff'd on other grounds*, 256 F.3d 1285 (11th Cir. 2001) (unnecessary to reach § 365(b)(2)(D) argument because it was "without dispute" that there had been no default); *In re Vitanza*, No. 98-19611, 1998 Bankr. LEXIS 1497, at *89-90 (Bankr. E.D. Pa. Nov. 13, 1998) (default was not in dispute, was not material and would not continue); *In re W. Pac. Airlines, Inc.*, 219 B.R. 298, 299-300 (Bankr. D. Colo. 1998), *rev'd on other grounds*, 219 B.R. 305 (D. Colo. 1998) (on declaratory judgment action defaults were not disputed); *In re Ernst Home Ctr., Inc.*, 209 B.R. 955, 963 n.6 (Bankr. W.D. Wash. 1997) (no motion to assume had been filed; issue was whether damages constituted a penalty); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 233 (Bankr. D. Neb. 1996) (court made findings of fact that there were nonmonetary defaults).

II. Even If The Rulings Of The Courts Of Appeals Were Viewed As Conflicting, Supreme Court Review Is Not Called For, As Additional Case Law Is Desirable To Assess The Effect Of § 365(b)(2)(D) In Application

"'It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.'" Justice Stevens, Opinion Respecting the Denial of the Petition for Writ of Certiorari, *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 943 (1978) (quoting Justice Frankfurter, Opinion Respecting the Denial of the Petition for Writ of Certiorari, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950)). In the present case, several factors suggest that even if the Court viewed the First Circuit and the Ninth Circuit as being in conflict regarding the interpretation of § 365(b)(2)(D), notwithstanding the disparity in factual context, certiorari should nonetheless be denied. First, the provision is relatively "young" and has only been addressed by two Courts of Appeals, both of which faced very different facts.

Since its enactment in 1994, only two Courts of Appeals have addressed the issue of the impact of § 365(b)(2)(D) in the context of a nonmonetary default: the First Circuit below, and the Ninth Circuit in *Claremont*. Further, these two cases are not only factually distinct from each other, as set forth above, but *Claremont* entails other unique circumstances.[14] With such minimal adjudication, in view of the disparate facts of these cases, there is insufficient law developed to warrant review by

14. Specifically, *Claremont* involved the assumption of a franchise agreement. Franchise agreements are considered a special type of agreement in that the franchisor has a particular interest in the exercise of the franchise rights that is not necessarily present in most contracts. *See, e.g., Vitanza*, 1998 Bankr. LEXIS 1497, at *82-88 (distinguishing *Claremont* and other cases involving franchise agreements on the basis that such agreements are subject to unique state statutory restrictions).

this Court. *See, e.g.*, Honorable John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved . . . The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result").[15]

Petitioners suggest, contrary to their assertions in the courts below,[16] that the potential interpretations of § 365(b)(2)(D) are so disparate already that "the issue is not one that will eventually accrue a majority of circuits on one side or another and, thereby, converge on one interpretation." Petition at 13. Petitioners

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15. Particularly in view of the disparate factual circumstances in the present case and *Claremont*, although the First Circuit stated that it disagreed with the Ninth Circuit in rendering its decision, such statements are not dispositive of whether a conflict does indeed exist sufficient to require this Court's intervention. *See, e.g., Mayes v. Pickett*, 537 F.2d 1080, 1083-84 (9th Cir. 1976), *cert. denied*, *United States v. Mayes*, 431 U.S. 924 (1977) (certiorari denied even though Court of Appeals decision stated that there was a conflict among the Circuits, and even though Court of Appeals expressed the desire for the Supreme Court to address the issue).

16. For instance, in their opening brief to the First Circuit, Petitioners argued that § 365(b)(2)(D) has been interpreted by courts as either: (1) "not . . . excus[ing] a debtor from curing nonmonetary defaults" or, (2) as meaning "a debtor is excused from curing all nonmonetary defaults." Pet'r First Cir. Br. at 13. *See also* Petitioners' Moving Brief to the Appellate Panel, dated March 18, 2002 at 9, 12 ("Pet'r App. Pan. Br.") (drawing the same binary distinction in the case law). Petitioners further argued that the proper interpretation of the statute was the former, and that adopted by the *Claremont* case. Pet'r First Cir. Br. at 21-25; Pet'r App. Pan. Br. at 7-9. Now, Petitioners have changed course with respect to the Ninth Circuit's interpretation of the statute, arguing that "neither the Ninth Circuit's reading of the statute nor the First Circuit's are entirely satisfactory." Petition at 14.

attempt to support their argument that this Court must provide a "definitive interpretation" of § 365(b)(2)(D) by pointing to what they argue are other "possible readings of the subsection" (besides those given by the First and Ninth Circuits): one "arguably different explanation" by the Fourth Circuit (in *In re Shangra-La, Inc.*, 167 F.3d 843 (4th Cir. 1999)), and "[y]et another explanation – and perhaps the best explanation – not yet adopted in a published opinion" (Petitioners' own concoction). Petition at 12-14.

With respect to the *Shangra-La* case, Petitioners repeatedly, albeit incorrectly, argued to the courts below that *Shangra-La* was consistent with *Claremont* in interpreting § 365(b)(2)(D) as not excusing a debtor from curing nonmonetary defaults. Now, in an attempt at mustering support for their argument that the Court's intervention is required to prevent hypothetical mayhem in the lower federal courts, and in a complete reversal of position, Petitioners argue that *Shangra-La* comes to a conclusion contrary to both the First and Ninth Circuits. Petition at 12. This is incorrect. *Shangra-La* did not involve a motion to assume (indeed, the bankruptcy court had already permitted assumption); rather, the non-debtor party had made a request for post-petition attorneys' fees. *Shangra-La*, 167 F.3d at 845. On appeal, the non-debtor party sought review of the lower court decisions denying the request with respect to post-petition fees. *Shangra-La*, 167 F.3d at 847. The *Shangra-La* court's reference to § 365(b)(2)(D) was in passing in a footnote, given as an example of the Bankruptcy Code's elimination of "some of the more onerous anti-debtor provisions that can be negotiated at arms length under state law." *Shangra-La*, 167 F.3d at 848 n.3. There is no other discussion of the provision in the case. Petitioners' attempted extension of one sentence in a footnote on a matter which was not even before the *Shangra-La* court is unpersuasive

and misleading. Therefore, the *Shangra-La* case cannot be said to have offered an interpretation of the statute that is either of precedential significance or creates cause for concern that the interpretation of § 365(b)(2)(D) will create a state of confusion.[17]

Indeed, it is worth noting that Petitioners do not actually state that the decisions below were wrong (calling into question the basis for their Petition), but urge this Court to opine on its own "definitive interpretation" of the provision. Petition at 14. Such review would be an inappropriate

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17. Further attempting to support their argument that this Court must definitively interpret the statute, Petitioners argue now for a supposed interpretation that, according to Petitioners, has not been adopted by any court but should be. Petition at 12. In other words, Petitioners posit that the Court should "legislate" the meaning of the statute in a manner that only Petitioners have heretofore considered. Not only is this again contrary to Petitioners' arguments below, but it seems clearly designed not to address the merits of *this* case, but merely concocted to muster support for the argument that courts will not come to a consistent interpretation of the provision. Such unfounded hypotheticals and contradictory arguments are not proper bases for the grant of certiorari.

In addition, Petitioners now argue that the legislative history on § 365(b)(2)(D) is both "scant at best" and "unlikely to contribute to a harmonization of the future understanding of the subsection." Petition at 13-14. Petitioners' argument is entirely contradictory to the positions taken by them below. *See, e.g.*, Pet'r First Cir. Br. at 14 ("The Legislative History Unequivocally Demonstrates Congress' Intent."). Further, it inexcusably ignores the distinction between the role of the Court and that of Congress. Petitioners' argument that "[o]nly this Court can issue an opinion that will instruct the courts as to the application of § 365(b) to carry out the legislative intent" (Petition at 16-17) is internally inconsistent with their position, only now for the first time taken, that the legislative history does not reveal legislative intent.

exercise of judicial discretion. These principles, and the present circumstances, indicate that denial of certiorari is the most appropriate course for this Court to follow.

III. Petitioners Exaggerate The Severity Of The Issues In The Case And Improperly Attempt To Impute Issues Not Presented By This Case

In an effort to market their case, Petitioners present a purported parade of horribles they claim will occur if certiorari is not granted. Petition at 17-19. None of the concerns raised by Petitioners is implicated by this case. Petitioners' simplistic examples ignore well-established bankruptcy law that negates their professed concerns. Finally, Petitioners misstate the overall impact of this case on the balance between debtor and creditor rights and ignore the extreme inequity that would result by precluding the Debtor from assuming the defaulted Leases in the exercise of its business judgment.

Petitioners' examples of purportedly problematic consequences of the First Circuit's ruling ignore the fact that *in this case* Petitioners were always going to have the opportunity to assert their alleged claims – which are actually alleged *defenses to payment*. Indeed, since the filing of the Requests, the Debtor has stipulated on the record that Petitioners may assert their alleged defenses in an action on the merits, which action is currently proceeding, and in which Petitioners have set forth defenses and counterclaims.[18]

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18. Thus, Petitioners' argument regarding § 1126(2)(A) (sic) (Petitioners apparently intended to refer to § 1124(2)(A)) and related sections is without merit. Petition at 20. There is no basis for their assertion that § 1124 (which governs impairment of claims or interests) prevents litigation of their defenses. More importantly, Petitioners fail to advise this Court that the Debtor has stipulated in filings with the Bankruptcy Court to the right of Petitioners to litigate their defenses, and that such defenses are actually being litigated now in state court.

See supra 11-12. Thus, under the actual facts of this case, there can be no parade of horribles.

Petitioners vastly overstate the potential consequences of this case, at least in part because they ignore the existence of other bankruptcy law, including Supreme Court precedent, which protects non-debtor parties to executory contracts and leases whose agreements are assumed by the debtor in bankruptcy. For instance, authority is uniform that once an executory contract is assumed, both parties to the contract – the debtor and the non-debtor – must perform under the contract according to its terms. *See, e.g., N.L.R.B. v. Bildisco*, 465 U.S. 513, 531 (1984) ("[s]hould the debtor-in-possession elect to assume the executory contract . . . it assumes the contract *cum onere*") (internal citations omitted). Thus, for example, Petitioners' argument regarding the potential problems relating to "the handling of hazardous materials or wastes" (Petition at 18), the implication of which is that a hazardous condition would be permitted to continue, is incorrect because such a condition is a *continuing* wrong which, if not resolved by the debtor or assignee to an executory contract at the time of assumption, would either preclude assumption of a contract or result in the commencement of an action by the non-debtor party, post-assumption, if the debtor or assignee failed to abide by the terms of the contract. The same result would ensue with Petitioners' example regarding the failure to maintain auto insurance. Petition at 17. Thus, with respect to future performance by a debtor or its assignee, assumption will not place the third-party in a worse position than he had been in prior to bankruptcy or assumption. This uniform principle applies with respect to the other examples provided by Petitioners (Petition at 17-18), including construction contracts, franchise contracts and software licenses.

In this case, preventing the Debtor from assuming the contract with Petitioners such that, based on Petitioners' erroneous view, Petitioners would no longer be obligated to pay the over $1 million in arrears on the Leases, would bestow upon Petitioners an improper "windfall." In short, Petitioners would be able to have used the leased Equipment for five years almost entirely without payment to the Debtor. Particularly in view of the fact that the Debtor could have sued to recover the unpaid lease payments both prior to filing for bankruptcy, and prior to seeking assumption of the contract,[19] it would be inequitable to preclude assumption in this case just to prevent the Debtor from now taking the very course it could have taken outside of bankruptcy or pre-assumption. There is no justifiable reason why the Debtor should have less power in bankruptcy to enforce its state law rights in contracts and recover payments due thereunder than the Debtor would have outside of bankruptcy. Such inequity, a manifest windfall to the Petitioners, would work not only to the detriment of the Debtor, but also to creditors of the Debtor's estate.

In this way, Petitioners also misstate the overall impact of this case on the balance between debtor and creditor rights. The First Circuit's decision has not altered the balance between debtors and creditors. As can be seen from this very case, the potential impact of the First Circuit's interpretation of § 365(b)(2)(D) will vary depending on the circumstances of the case. Presently, the First Circuit's ruling permits the Debtor to assume the contracts in the exercise of its business judgment, and to sue to recover the substantial sums owed to the Debtor and the estate under the Leases, but still permits

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19. As noted above, the state court litigation against Petitioners was actually commenced in October 2003, prior to assumption.

Petitioners, the non-debtor parties, to have their alleged claims and defenses heard and determined in a court of competent jurisdiction. Thus, even were Petitioners' list of horribles hypothetically plausible, they simply do not apply to the particular facts of this case, and as such, a grant of certiorari on such grounds would be inappropriate.

IV. Certiorari Should Be Denied Because There Is No Real Case Or Controversy Between The Parties

Petitioners' request for certiorari should be denied because it is nothing more than an academic exercise. Indeed, because the determination of whether there is actually any default, nonmonetary or otherwise, is currently being litigated in state court, and may be so litigated regardless of the outcome of this appeal, there is no case or controversy before the Court. Petitioners will not be injured if the Petition is denied. If the state court litigation results in a determination of no default by the Debtor, the issue of whether a cure is required under § 365 is completely academic. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("Abstract injury is not enough . . . the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'") (internal citation omitted). Under any circumstance, the only harm that Petitioners could possibly suffer is payment under the Leases to the extent permitted under applicable state law.

Petitioners' efforts here (and in every appeal they have taken) are a transparent attempt to prevent the Leases from being assumed based on their flawed position that the failure to assume, or a delay in assumption, bars the Debtor from suing to recover the approximately $1 million in unpaid Lease payments. However, even if this case were remanded to the Bankruptcy Court, there is nothing that would prevent the

Bankruptcy Court from abstaining from rendering a decision on assumption prior to permitting the underlying state court litigation to proceed to conclusion. Because the bankruptcy court would likely be required to permit the Debtor's state court actions to recover the unpaid lease payments to go forward in any event (*see* 28 U.S.C. § 1334(c)(1) (permissive abstention) or (2) (mandatory abstention)),[20] certiorari is unwarranted. *See, e.g., The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183-84 (1959) (dismissing a writ of certiorari after oral argument and noting that party would be able to try its claim elsewhere).

Where the issue on which Petitioners seek to have this Court rule is not squarely presented in the very case which is the vehicle for the Petition, certiorari should be denied. This Court's review power is not designed to address purely academic or theoretical disputes but rather to address issues that relate to the cases before them. "While this Court decides questions of public importance, it decides them in the

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20. 28 U.S.C. § 1334(c) reads as follows:

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *Monrosa*, 359 U.S. at 184.

V. The Decisions Of The Courts Below Were Correctly Decided

Ultimately, certiorari is unnecessary in this case because the decisions of the courts below were correct, both with respect to the issue of whether § 365(b)(2)(D) requires that a debtor cure nonmonetary defaults as a condition to assumption, and as to whether any claims or defenses available to Petitioners should be addressed in the context of an action already underway in state court and not during the summary proceeding of assumption.[21]

With respect to § 365(b)(2)(D), the lower courts correctly interpreted the provision as not requiring the Debtor to cure alleged nonmonetary defaults. While the Debtor believes that the language of the statute is unambiguous and thus should be followed, even if viewed otherwise, the results reached by the lower courts should be affirmed.[22] Thus, to the extent

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21. Although the Debtor does not believe certiorari is warranted or appropriate in this case, to the extent that the Court determined to grant certiorari, on the merits, the Debtor would seek to rely on all grounds for affirmance presented by the record before the courts below, and respectfully reserves its rights with respect thereto. *See Bennett v. Spear*, 520 U.S. 154, 166-67 (1997) (in deciding whether to affirm the dismissal of petitioners' suit, Court considered alternative grounds that were raised in the courts below and briefed and argued in the Supreme Court, despite the fact that these grounds were never considered by the lower courts, because "[a] respondent is entitled . . . to defend the judgment on any ground supported by the record").

22. While the First Circuit found the language of § 365(b)(2)(D) ambiguous (*Bankvest III*, 360 F.3d at 297), both the Bankruptcy Court

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that the Court viewed § 365(b)(2)(D) as ambiguous, such ambiguity must be resolved with due consideration of the policy and practical implications involved, particularly in light of the fact that the legislative history of the section is too sparse to be of assistance. As the First Circuit stated, preventing debtors from assuming executory contracts or leases based on the existence of an uncurable nonmonetary default

> cannot, in our view, be what Congress intended. To prevent a debtor from assuming a contract based on historical events that it cannot remedy undermines Congress's basic purpose in § 365: to promote the successful rehabilitation of the business for the benefit of both the debtor and all its creditors. This case well illustrates the force of that concern. Eagle and Newark together owe BankVest approximately $1 million in unpaid rent. Yet they argued to the bankruptcy court that BankVest's failure to complete delivery of the leased equipment is an historical fact not susceptible to cure. So rather than simply seek an offset for any pecuniary harm they may have suffered, Eagle and Newark would deny the estate all $1 million in unpaid rent by compelling BankVest to cure what they allege is incurable. That is plainly inconsistent with Congress's purpose in the Bankruptcy Code to maximize the value of the estate for all creditors.

Bankvest III, 360 F.3d at 300 (internal citations, quotations and footnotes omitted).

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and the Bankruptcy Appellate Panel found the plain language reading of the provision disclosed that the provision did not require a debtor to cure nonmonetary defaults prior to assumption of an executory contract or lease. *Bankvest II*, 290 B.R. at 447; App. 263; *Bankvest I*, 270 B.R. at 543-44; App. 236-37.

In addition to their respective holdings with respect to § 365(b)(2)(D), the courts below recognized the summary nature of a motion to assume. *Bankvest III*, 360 F.3d at 302; *Bankvest II*, 290 B.R. at 447-48; App. 263-64; *Bankvest I*, 270 B.R. at 544; App. 237. As explained by the Bankruptcy Appellate Panel, the only issue properly before the bankruptcy court during such proceeding is whether assumption or rejection of the contract is based upon the debtor's good business judgment. *Bankvest II*, 290 B.R. at 447-48; App. 263-64. Citing to *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993), the First Circuit also confirmed that the assumption or rejection proceeding is not the place for resolving the underlying defenses or counterclaims of the non-debtor party. *Bankvest III*, 360 F.3d at 302. In *Orion*, the bankruptcy court granted the debtor's motion to assume an executory contract under 11 U.S.C. § 365(a). *Orion*, 4 F.3d at 1097. In connection therewith, the court ruled that the debtor did not breach certain provisions of the contract which the debtor sought to assume over the objection of the non-debtor. *Orion*, 4 F.3d at 1097. The Second Circuit reversed both the bankruptcy court and the district court and held that it was error for the bankruptcy court to decide contractual disputes in the context of deciding a motion to assume or reject. *Orion*, 4 F.3d at 1098. The Second Circuit stated that

> [a]t heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues.

Orion, 4 F.3d at 1098-99.

The emphasis by the lower courts on this aspect of the case provides another reason why this Court should abstain from granting certiorari, even if the Court viewed the decisions of the First and Ninth Circuit as conflicting. *See, e.g., Goett v. Union Carbide Corp.*, 361 U.S. 340, 344-45 (1960) (Harlan, J., dissenting) (arguing that remand to the Court of Appeals was inappropriate where the Court of Appeals had "exercised the traditional discretion of any court to choose what appears to it a narrower and clearer ground of decision in preference to a broader and more controverted one," and noting that the Supreme Court did not suggest that the Court of Appeals exceeded its discretion in deliberately deciding that it need not reach the difficult issue about which there was a conflict in authority).

The effect of the courts' rulings below is to require Petitioners, who are presently litigating defenses and claims in state court collection actions, to adhere to the obligations Petitioners undertook pursuant to negotiated contracts governed by state law. The rulings prevent Petitioners from invoking *debtor* protections set forth in § 365 to defeat the Debtor's state law rights to sue on such contracts. *See Butner v. United States*, 440 U.S. 48, 54 (1979).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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